

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 24001-1-III

Respondent,

Division Three

v.

TODD EARL BRIDGES,

UNPUBLISHED OPINION

Appellant.

BROWN, J.—Todd Bridges appeals his three malicious harassment and two second degree assault convictions on the basis of evidence sufficiency and prosecutorial misconduct in argument. Finding no error, we affirm.

FACTS

On October 24, 2004, Mr. Bridges, Ronald Trammell, and Tara Krivenko entered Dempsey's Brass Rail, a bar in Spokane with a predominately gay clientele. According to the bartender, Mr. Trammell had his shirt tied up "Daisy Duke" style and acting effeminate. Ms. Krivenko asked if she could use the restroom. Mr. Trammell and Mr. Bridges requested drinks at the bar, but were refused for identification reasons. Mr.

Trammell became upset and started screaming “[—]ing faggots”. Report of Proceedings (RP) at 178-79. Mr. Bridges laughed at Mr. Trammell’s comments and encouraged Mr. Trammell’s conduct. While disputed by Mr. Bridges, other evidence showed he made similar derogatory comments.

David Goulet, Brandon Standerfer, Gabriel Schliep, Enoch Staton and others were seated having drinks in the restaurant part of the bar. Mr. Goulet, a performer at the bar, was dressed in women’s clothing. As Mr. Trammell and Mr. Bridges passed by, Mr. Trammell began directing his derogatory comments toward them. Mr. Schliep asked Mr. Trammell and Mr. Bridges to leave. The evidence conflicted as to who provoked who first, but all agreed about Mr. Trammell’s derogatory language. When Mr. Standerfer got up from the table, Mr. Trammell punched him causing a gash across his eyebrow requiring 17 stitches. Then, Mr. Trammell punched Mr. Goulet in the eye causing bruising and swelling. The testimony showed Mr. Bridges was throwing ashtrays, and at one point, everyone was fighting, including Mr. Bridges.

The bartender, Alan Proffitt, attempted to break up the fight. According to Mr. Proffitt, Mr. Bridges threw a punch at him and grazed his forehead, calling him several derogatory names, including “faggot.” RP at 153. Mr. Proffitt identified Mr. Bridges, not Mr. Trammell, as the primary aggressor in the fight. Mr. Proffitt related he saw Mr. Bridges throw the first punch and hit another man who was entering the bar.

Mr. Bridges testified that he hit one person at the table and probably hit Mr. Proffitt as well. He acknowledged Mr. Trammell’s language use, but characterized his own participation as just watching the men

push each other and then stepping in to defend Mr. Trammell. Mr. Bridges denied making derogatory comments.

Although listed on both witness lists, Mr. Trammell and Mr. Schliep were not called to testify. During rebuttal closing arguments, the prosecutor said: “Last, but not least. Mr. Trammell is on the defense witness list. Mr. Trammell was not produced. Why do you think that is?” RP at 293. The trial court sustained a defense objection to these statements and instructed the jury to disregard them. No request for a mistrial was made. A “missing witness” instruction was included in the court’s instructions.

The jury returned verdicts on 5 of 10 counts. Mr. Bridges was found guilty of malicious harassment against Mr. Standerfer, Mr. Schliep, and Mr. Goulet. He was convicted of second degree assault against Mr. Standerfer and Mr. Goulet. He appeals.

ANALYSIS

A. Evidence Sufficiency

The issue is whether, considering principal and accomplice liability, sufficient evidence supports Mr. Bridges’ convictions for malicious harassment and second degree assault.

We review evidence sufficiency challenges most favorably to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We consider the State’s evidence true together with all reasonable inferences. *Id.* We defer to the trier of fact and will affirm where the essential elements of the crime can be found beyond a reasonable doubt. *State v. Walton*, 64

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Wn. App. 410, 415, 824 P.2d 533 (1992). Circumstantial evidence and direct evidence are equally reliable and equally support the conviction. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Criminal liability is equal for a principal and an accomplice. *State v. Rodriguez*, 78 Wn. App. 769, 772-73, 898 P.2d 871 (1995). A person is guilty as an accomplice if, “[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3)(a). “[I]t is the intent to facilitate another in the commission of a crime by providing assistance through his presence or his act that makes the accomplice criminally liable.” *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303 (1992). “Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.” *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

First, regarding malicious harassment, Mr. Bridges argues he harbored no ill will toward Mr. Schliep, Mr. Standerfer, or Mr. Goulet because of their sexual orientation.

Under malicious harassment law:

(1) A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim’s race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap:

(a) Causes physical injury to the victim or another person.

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RCW 9A.36.080(1)(a).

The statute enhances the punishment for criminal conduct where the victim is chosen because of perceived membership in a protected category. *State v. Lynch*, 93 Wn. App. 716, 721, 970 P.2d 769 (1999). To convict, the State had to prove a physical injury or assault, and conduct motivated at least partly by the victim's sexual orientation. *Id.*

Viewing the evidence most favorably for the State, the evidence shows Mr. Trammell and Mr. Bridges entered a bar with a predominately gay clientele. Mr. Trammell had his shirt tied up "Daisy Duke" style and was mockingly effeminate. When leaving the bar, Mr. Trammell directed derogatory remarks about homosexuals toward seated patrons, one was dressed as a woman. Mr. Bridges laughed at Mr. Trammell's comments and encouraged Mr. Trammell. Mr. Bridges made derogatory remarks about homosexuals. Then, Mr. Trammell attacked Mr. Schliep, Mr. Standerfer, and Mr. Goulet. Mr. Bridges joined in the fray throwing and hitting punches.

The facts provide sufficient evidence for a rational trier of fact to find Mr. Bridges and Mr. Trammell acted intentionally and maliciously based on their perceptions of the victims' sexual orientation. Under accomplice liability, Mr. Bridges need not personally strike each victim or direct his derogatory comments to the victims individually. Mr. Trammell struck Mr. Schliep in the head several times during the altercation. Mr. Standerfer received a huge gash across his eyebrow requiring 17 stitches. Mr. Goulet had bruising and swelling around his eye after the attack. Again, if Mr. Bridges did not personally cause each injury, he is liable

for the injuries as Mr. Trammell's accomplice.

Second, regarding the second degree assaults, Mr. Bridges argues the evidence does not show he personally assaulted Mr. Standerfer or Mr. Goulet. Second degree assault is defined by RCW 9A.36.021, partly providing: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . (e) [w]ith intent to commit a felony, assaults another." RCW 9A.36.021(1)(e). The named felony here is malicious harassment. RCW 9A.36.080(7) (classifying malicious harassment as a class C felony).

The term assault is not statutorily defined. "Washington courts apply the common law definition to the crime." *State v. Aumick*, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995) (citing *State v. Walden*, 67 Wn. App. 891, 893, 841 P.2d 81 (1992)). Washington recognizes three definitions of assault: "(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.'" *Aumick*, 126 Wn.2d at 426 n.12 (quoting *Walden*, 67 Wn. App. at 893-94).

The evidence shows Mr. Trammell assaulted both Mr. Standerfer and Mr. Goulet when he punched them. Mr. Bridges acknowledges hitting the third victim, albeit in defense of Mr. Trammell. As discussed, it is Mr. Bridges' intent to facilitate Mr. Trammell's criminal conduct that is critical. Again, as discussed, sufficient evidence shows Mr. Bridges was acting as Mr. Trammell's accomplice during the assaults.

B. Prosecutorial Misconduct

The issue is whether the prosecutor's argument pointing to Mr. Trammell's absence at trial constituted prosecutorial misconduct.

A defendant alleging prosecutorial misconduct must first establish the prosecutor's improper conduct and, second, its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Alleged improper statements are viewed in the context of the State's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Despite the State's contrary argument, Mr. Bridges did not have an obligation to object to the missing witness instruction because the instruction arguably applied to the State's failure to produce one of the victims, Gabriel Schliep, as a witness. Indeed, Mr. Bridges argued this to the jury. Our focus is whether the State's comments highlighting the defense's failure to call Mr. Trammell as a witness are prosecutorial misconduct.

Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). However, where a party fails to call a witness within the control of that party to provide material testimony and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). In terms of limitations, the testimony must not be privileged, necessarily self-incriminating, unimportant, or cumulative. *Id.* at 486-89; *State v.*

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Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Further, no inference is permitted if the witness's absence can be satisfactorily explained. *Blair*, 117 Wn.2d at 489.

Here, Mr. Trammell was listed as a witness on both the State and defense witness lists. Nothing in the record explains Mr. Trammell's absence. However, the burden is on the party against whom the rule operates to provide some explanation for the witness's absence. *Id.* Mr. Bridges did not do so. Further, Mr. Bridges argued the attacks were not based upon any perception about sexual motivation. Logically, Mr. Trammell might have corroborated a different reason. No other limiting factor applies.

First, the missing witness inference applies solely if the uncalled witness is "peculiarly available" to one of the parties. Mr. Trammell was Mr. Bridges' friend and, as such, he could be seen as peculiarly within the control of the defense.

Second, the inference will not apply if the witness's testimony is unimportant or cumulative in nature. Mr. Trammell's motivation bore on a crime element. Mr. Trammell was in a unique position to state his motivation during the events described.

Third, the question remains unanswered if Mr. Trammell's testimony would entirely fall under his privilege against self-incrimination. As the primary aggressor, Mr. Trammell's testimony would most likely be self-incriminating thereby negating the inference. The record shows Mr. Trammell pleaded guilty to several charges arising from this incident, but does not show to what charges or the nature and scope of the plea or whether sentencing had already occurred. Thus, the record is inconclusive. Mr. Bridges has failed to show the

comments were necessarily improper.

In any event, Mr. Bridges cannot show prejudice. Defense counsel immediately objected, explaining Mr. Trammell was also included on the State's witness list. The trial court sustained defense counsel's objection and instructed the jury to disregard the State's argument. When a trial court issues a curative instruction, the jury is presumed to follow the instruction, and a mistrial should not be granted unless the misconduct is so flagrant that no instruction could cure it. *State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). The State immediately concluded its argument after the curative instruction and did not renew the argument. Considering all, Mr. Bridges does not establish the State's argument substantially influenced the jury's verdict.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Sweeney, C.J.

Schultheis, J.